It is Mr. Wrigglesworth's contention that the case of the appellants falls within the provisions of sub-section (2) of section 8 on the ground, as I understand it, that they entered into actual possession by leave of Wan Zainab and Wan Yusoff.

But this sub-section applies where the person in actual possession has entered into actual possession, *inter alia*, by leave or licence of or on behalf of a person not being the proprietor who claims (present tense) to be entitled to such land or any interest therein. There is no evidence whatever that Wan Zainab or Wan Yusoff makes any claim or ever made any claim to be entitled to the land or any interest therein. Nor is there any evidence that that they were ever entitled to the land or to any interest therein. In so far as Wan Zainab, Wan Yusoff and the appellants are concerned the land is and always has been State land. By virtue of the definition of State land in section 2 of the Land Enactment, 1938, land when occupied under Approved Application "shall be taken and deemed to be State land." As, therefore, the whole of the land with which we are concerned is State land and will continue to be so until the date of alienation, which by virtue of section 13 of the Land Enactment, 1938, will be the date of the registration of the document of title, we are solely concerned in this case with State land.

In section 2 of the Settlement Ordinance the word "claimant" is defined as meaning, unless the context otherwise requires, a person who claims either to be a proprietor or to have any interest in land in a Settlement Area. By "proprietor" is meant, I think, a proprietor as defined in section 2 of the Land Enactment, 1938. The words "interest in land" in my opinion mean a legal or equitable interest in land and Mr. Wrigglesworth concedes that this is so. I do not think that persons, as in the case of the appellants, in occupation of State land otherwise than under a temporary occupation licence or under approved application can be said to have an "interest in land". The only provision in the Settlement Ordinance specifically applicable to State land is section 7 which applies as we have already seen, *inter alia*, when the person in possession is a person in occupation of State land under approved application or holds under a person in occupation of State land under approved application. But as I have already said section 7 is not applicable in this case. As no question of a temporary occupation licence arises it is unnecessary to decide whether the holder of such a licence does or does not have an interest in land. In my view therefore the Settlement Ordinance has no application to State land except where specific provision is made, as in section 7, and possibly I do not decide the point one way or the other, where the person in possession is in possession under a temporary occupation licence.

If, which has not been admitted by the respondent, the appellants planted rubber on land in respect of which the respondent was the Approved Applicant, then the appellants have only themselves to thank if they lose the rubber. The respondent's rights over the land in respect of which he is the Approved Applicant are governed by the Land Enactment and the Rules made thereunder. The remedy of the appellants in so far as land not included within Approved Application No. 2/54 is concerned, is to make an application for alienation of the State land to them.

What both the Assistant District Officer and the District Officer purported to do with regard to this land was therefore *ultra vires* because for the reasons I have stated above the Settlement Ordinance was not applicable in the particular facts of this case. The inquiry held by the Assistant District Officer was a nullity. I therefore allow the appeal and quash the orders of the Assistant District Officer and the District Officer. There will be no order as to costs.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.*

MOHAMED BIN BACHOK v. PUBLIC PROSECUTOR

[A. Cr. J. (Adams J.) March 9, 1961]

[Johore Bahru — Criminal Appeal No. 1 of 1961]

Penal Code, s.409 — Criminal breach of trust — Criminal Procedure Code (Cap. 6), ss.153(2) and 164 — Joinder of charges — Exceptional circumstances to warrant quashing sentence of imprisonment.

This was an appeal from the decision of the learned President of the Sessions Court where the accused was convicted on three charges of criminal breach of trust under section 409 of the Penal Code. It was argued that the joinder of the three charges was bad, and that there was no evidence of dishonest intention.

Held: (1) the criminal intention of the accused in misappropriating money in this case became manifest when the shortage was discovered and therefore the joinder of the charges was good;

(2) though the general punishment in these cases is imprisonment as stated in *Public Prosecutor* v. *Ismail bin Loyok*, (4) in the particular circumstances of this case an exceptional course is to be taken by quashing the sentence of imprisonment.

Per curiam: "If the accused had given an explanation which, even the Court does not believe it, the Court considers it consistent with truth on considering the whole of the evidence, then the Court must give the accused the benefit of the doubt . . . In assessing the sentence it is necessary that the Court take into consideration all the circumstances . . ."

Cases referred to:—

(1) *Subrahmania Ayyar* v. *King-Emperor* (1901) 28 I.A. 257; I.L.R. 25 Mad. 61.

(2) *King-Emperor* v. *Chaturbhuj Narain Choudhury* I.L.R. 1936 Patna 108 at p. 119.

(3) *Regina* v. *Batty* 4 Ky. 441.

(4) *Public Prosecutor* v. *Ismail bin Loyok* [1958] M.L.J. 223.

(5) *Public Prosecutor* v. *Mohamed Hashim* [1961] M.L.J. 11.

MAGISTRATE'S CRIMINAL APPEAL.

David Marshall for the appellant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Adams J.: The accused Mohamed bin Bachok was charged and convicted on three charges of criminal breach of trust contrary to section 409 of the Penal Code by the learned President of the Sessions Court sitting at Johore Bahru on the 3rd November, 1960. He was sentenced to 5 months' imprisonment on the first charge, 6 months' imprisonment on the second charge and 3 months' imprisonment on the third charge. All sentences to run concurrently.

The brief facts are that the accused at all material times was the only clerk attached to the Junior Trade School at Johore Bahru. A part of his duties were to accept fees in relation to tuition in the school and accommodation in the hostel. He was also in charge of the petty cash.

In May, 1960 an audit was carried out and there was a shortage of $684 in respect to school fees collected from March to September 1959, $1,511.46 in respect to hostel fees collected from February 1959 to November 1959, and a petty cash advance of $100, all of which sums were proved to have been entrusted to the accused. The accused was charged with criminal breach of trust of these monies between 11th of May and 15th of May, 1960, because this was the time when the shortages were discovered.

Mr. Marshall argued that on the facts the criminal misappropriation relating to the criminal breach of trust of the petty cash must have taken place before Mr. Murray left in June, 1959 and therefore the joinder of this charge with the other two, since they did not fall in a period of one year as required by section 153(2) or 164 of the Criminal Procedure Code, was bad. He cited *Subrahmania Ayyar* v. *King-Emperor*[1] as authority. He pointed out that if this were so the trial was void and the defect was not curable under section 422 of the Criminal Procedure Code. This was a misjoinder and therefore would be an illegality and not an irregularity.

It is very difficult always to know exactly when a criminal breach of trust did take place because no one can see into the mind of the accused and no one can then therefore know exactly when the accused formed the criminal intention. I think that the *dictum* of Rowland J. in *King-Emperor* v. *Chaturbhuj Narain Choudhury*, [2] at page 119 is relevant:—

> "The date assigned in the charge to the commission of the offence is between 21st and 27th March, 1934: whereas the evidence indicates at least the possibility that accused had committed the misappropriation earlier. Is the charge then defective? I think not. The gist of the offence being the mental act of the accused, it is beyond the power of any other person to give direct proof of the act or of its date: the prosecutor in asking the Court to frame a charge is entitled to refer to the date of the overt act by which that intention is manifested and put into effect, and on which he relies as proof of the misappropriation. It is the practice and in my view the correct practice, to frame the charge with reference to any such act."

I think it must be held that the criminal intention (if any) of the accused in misappropriating money in this case became manifest when the shortage was discovered and therefore the joinder of the charges was good.

Mr. Marshall also argued that there was no evidence that the accused had a dishonest intention. He pointed out that the accused, a young man, a temporary clerk, was placed in charge completely on his own of the administration of the Junior Trade School. He argued that there may well have been a misappropriation but the misappropriation must be shown to be criminal in that there must have been an intention to cause wrongful loss to his employer or wrongful gain to himself. He cited *Regina* v. *Batty*[3] but the facts in this case quite clearly show that the accused had the money in his possession for a considerable time and he failed to give any explanation for the shortage as well as to account for it. There is also evidence that he gave false explanations.

Finally Mr. Marshall argued that the learned President had misdirected himself on the onus of proof and took exception to the following phrase:

> "However, even considering this together there is still no sufficient grounds to exonerate the accused from the offence he was charged with especially in the light of his dishonest intention which was apparent from the facts pointed out earlier."

He argued that this indicated that the President had not directed his mind to the fact that the accused was only bound to raise the doubt in the mind of the Court.

It is very true that at no time does an accused person have to prove his innocence and the Court may only convict when the Court is sure that the accused is guilty of the offence charged. If the accused has given an explanation which, even the Court does not believe it, the Court considers is consistent with truth on considering the whole of the evidence, then the Court must give the accused the benefit of the doubt.

If however one takes the phrase in its context and in the light of the whole of the grounds of decision it is quite clear that what the learned President says is that in the light of the whole evidence, no reasonable explanation as to how the money came to be missing was made. The phrase does not mean that he considered that the accused had not "proved" his innocence. In those circumstances the conviction of the accused must be upheld.

There was also an appeal against sentence. In considering the question of sentence the learned President has said this:

> "In assessing the sentences I have also to consider public interest especially when the accused is a public servant handling public money. Public interest demands

not only that the accused should be adequately punished for the crime that he had committed but it should deter others from committing a similar crime. Had I not considered the circumstances mentioned in the last paragraph, I would have certainly imposed much heavier sentences."

I agree with the *dictum* of Smith J. in *Public Prosecutor* v. *Ismail bin Loyok*[4], that "until it is understood by all public servants in this country that the normal punishment for helping themselves to public money is to be sent to prison there will continue to be weak-willed persons prepared to pilfer the till." It is of course impossible to lay down a general rule and every case must be looked upon on the facts of that particular case. The *dictum* in *Ismail bin Loyok's* case was approved by Rigby J. in *Public Prosecutor* v. *Mohamed Hashim*[5], but it will be noted that the learned Judge refused to allow the appeal by the Public Prosecutor against the decision of the learned President who had bound the accused over for criminal breach of trust of $190. Are there circumstances in this case which are not normal? I would suggest that there are. In assessing the sentence it is necessary that the Court take into consideration all the circumstances before deciding on the sentence and I consider that there are very good reasons in this case as to why a term of imprisonment should not be imposed in spite of the fact that the sums embezzled are quite large. The accused is a comparatively young man who joined as a temporary clerk in the early 1950s. Since he was a temporary clerk I take it that he had not the necessary qualifications to join the regular clerical service. That being the case I think that it follows that he must be less educated and possibly less intelligent than the regular State Clerical Service clerks. In spite of this he was sent to the Trade School and some time in 1958 was faced with having to be responsible for the accounting and banking of monies collected in respect to school fees and hostel charges. He had had no accounting experience. He was the only clerk and the Chief Instructor of the Trade School exercised little or no supervision over him. It seems to me that it is extremely unfortunate that a young man, a temporary clerk, of such inexperience should be placed in such a position. It is quite obvious that the Chief Instructor would have very little time to exercise supervision and I am therefore of the view that since quite a large sum of money had to be collected a responsible clerk of some seniority should have been posted there. It is quite probable that the original misappropriation may have been to cover up a shortage occasioned through inexperience. I think that in view of this fact and the fact that there has been complete restitution there are circumstances which warrant an exceptional course to be taken in this case and therefore, on the facts of this particular case, and in the particular circumstances of this case, I quash the sentence of imprisonment and order that he be released on his entering into a bond in his own recognisance of $500 and two sureties of $250 for three years to appear and receive judgment if and when called upon and in the meantime to keep the peace and to be of good behaviour.

Conviction upheld.
Sentence of imprisonment quashed.

Solicitors: *Marshall & Chung.*